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Lim Geok Boon v Loo Teck Huat & Ors

B HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-22NCvC-62–05 OF 2020
EVROL MARIETTE PETERS JC
1 JANUARY 2021

C *Civil procedure — Striking out — Application to strike out action — Writ of summons and statement of claim prohibiting execution action — Whether the third defendant had cause of action despite not having privity to the contract — Rules of Court 2012 O 18 r 19*

D This was the third defendant's application to strike out the plaintiff's writ of summons and statement of claim pursuant to O 18 r 19 of the Rules of Court 2012 ('the ROC'). The plaintiff had entered into a purported sale and purchase agreement ('SPA') with GST Realty Sdn Bhd to purchase a piece of property. The first defendant was a director of GST Realty Sdn Bhd whilst the second E defendant was an individual authorised to manage the sale and purchase transaction on behalf of GST Realty Sdn Bhd. It was undisputed at all material times, the third defendant was the debenture holder and master charge of the property pursuant to a loan agreement and a debenture agreement. It was also undisputed that the third defendant never received the redemption sum from F the plaintiff. The plaintiff had filed an action seeking an order to prohibit the defendant from taking execution action against the plaintiff or the property.

Held, allowing the application with costs:

G (1) 'Scandalous' generally referred to matters which improperly cast a derogatory light on someone, usually a party to an action with respect to moral character or uses repulsive language; 'frivolous or vexatious' generally referred to a groundless action, with no prospect of success, often raised to embarrass or annoy the other party to an action; and 'abuse H of the process of the court' generally referred to situations where the court's process was used for an unlawful object and not for the actual purpose intended for justice. It was therefore the duty of the court to scrutinise the evidence and merits of the case to determine whether the action was bound to fail (see paras 8–9).

I (2) It was crucial to note that the third defendant was not a party to the SPA and therefore not privy to it. In any event, to obtain a declaration of ownership of the property the plaintiff would have to pay the redemption sum to the third defendant and subsequently claim that from the first and second defendants. In the absence of a cause of action, the third

defendant's interest on the property was indefeasible by virtues of s 340(1) of the National Land Code. Since there was no cause of action reflected in the plaintiff's statement of claim, there was no circumstances that would render the interest of the third defendant defeasible (see paras 12–14 & 16).

[Bahasa Malaysia summary

Ini merupakan permohonan defendan ketiga untuk membatalkan writ saman dan penyataan tuntutan plaintif selaras dengan A 18 k 19 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Plaintif telah memasuki satu perjanjian jual beli ('SPA') dengan GST Realty Sdn Bhd untuk membeli satu hartanah. Defendan pertama merupakan pengarah GST Realty Sdn Bhd manakala defendan kedua merupakan individu yang diberi kuasa untuk menguruskan transaksi jual beli bagi pihak GST Realty Sdn Bhd. Ianya tidak dinafikan pada setiap masa material bahwa defendan ketiga merupakan pemegang debentur dan pajakan utama hartanah tersebut selaras dengan satu perjanjian pinjaman dan perjanjian debentur. Ianya juga tidak dinafikan bahawa defendan ketiga tidak pernah menerima jumlah penebusan dari plaintif. Plaintif telah memfailkan satu tindakan yang memohon utuk menghalang defendan dari mengambil tindakan perlaksanaan terhadap plaintif atau hartanah tersebut.

Diputuskan, membenarkan permohonan dengan kos.

(1) 'Scandalous' secara amnya merujuk kepada perkara yang tidak wajar membuatkan seseorang kelihatan sebagai hina, kebiasaanya satu pihak di dalam tindakan berkaitan dengan karakter moral atau menggunakan bahasa kesat; 'frivolous atau vexatious' secara amnya merujuk kepada tindakan tidak berasas, yang tiada kebarangkalian untuk berjaya, selalunya dibangkitkan untuk memalukan atau menjengkelkan pihak kepada satu tindakan dan penyalahgunaan proses mahkamah secara amnya merujuk kepada keadaan dimana proses mahkamah digunakan untuk satu perkara yang tidak sah dan bukannya untuk sebab utama untuk tujuan keadilan. Oleh yang demikian ianya merupakan tanggungjawab mahkamah untuk melihat kepada keterangan dan merit kes untuk menentukan sama ada tindakan tersebut akan gagal (lihat perenggan 8–9)

(2) Ianya penting untuk dinyatakan bahawa defendan ketiga bukanlah satu pihak kepada SPA dan oleh itu tidak mempunyai pengetahuan mengenainya. Dalam apa keadaan sekalipun, untuk mendapatkan pengisytiharan pemilikan harta plaintif harus membayar jumlah penebusan kepada defendan ketiga dan kemudiannya menuntutnya daripada defendan pertama dan kedua. Dalam ketiadaan kausa tindakan, kepentingan defendan ketiga terhadap hartanah tesebut boleh ditewaskan selaras dengan s 340(1) Kanun Tanah Negara. Oleh kerana tiada kausa tindakan wujud dalam penyataan tuntutan plaintif, tiada

keadaan yang boleh menyebabkan kepentingan defendan ketiga boleh ditewaskan (lihat perenggan 12–14 & 16)]

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)
Chang Yun Tai & Ors v Dataran Mantin Sdn Bhd & Ors [2008] 5 MLJ 295, HC (folld)
Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases [1983] 2 MLJ 227, FC (refd)
Holee Holdings (M) Sdn Bhd v Chai Him & Ors [1997] 4 MLJ 601, HC (refd)
Mohamed Yusop bin Abdul Wahab v American Express (M) Sdn Bhd [2002] 6 MLJ 507, HC (refd)
Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16, SC (refd)
See Thong & Anor v Saw Beng Chong [2013] 3 MLJ 235, CA (refd)
Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1; [2016] 3 CLJ 1, FC (folld)
Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors [1983] 1 MLJ 81, FC (refd)
Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1, PC (refd)

Legislation referred to

National Land Code s 340(1)
Rules of Court 2012 O 18 r 19, O 18 r 19(1), O 18 r 19(1)(a)

Lim Kim Siong (SK Song) for the plaintiff.
Lee Xiao Yao (Jal & Lim) for the defendant.

Evrol Mariette Peters JC:

INTRODUCTION

[1] This is the third defendant's application ('this application') in encl 10 to strike out the plaintiff's writ of summons and statement of claim dated 14 May 2020 pursuant to O 18 r 19 of the Rules of Court 2012 ('the Rules of Court').

THE BACKGROUND FACTS

[2] The plaintiff, an individual, had entered into a purported sale and purchase agreement ('the SPA') dated 16 March 2018 with GST Realty Sdn Bhd to purchase a piece of property ('the property'). The first defendant was a director of GST Realty Sdn Bhd, whilst the second defendant was an individual authorised to manage the sale and purchase transaction on behalf of GST Realty Sdn Bhd. It was undisputed that at all material times, the third

defendant, a bank, was the debenture holder and master chargee of the property, pursuant to a loan agreement and debenture agreement, both dated 1 August 2013.

[3] Despite the SPA between GST Realty Sdn Bhd and the plaintiff, it was undisputed that the third defendant had never received the redemption sum from the plaintiff.

[4] On 14 May 2020, the plaintiff filed the writ of summons and statement of claim, seeking an order to prohibit the third defendant from taking execution action against the plaintiff or the property. Hence, this application was filed by the third defendant, which was allowed for the following reasons.

THE APPLICABLE LAW

[5] The starting point of reference in this application is O 18 r 19(1) of the Rules of Court, which reads as follows:

> Order 18 — *Pleadings*
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> Rule 19 *Striking out pleadings and endorsements*
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> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:
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> (a) it discloses no reasonable cause of action or defence, as the case may be;
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> (b) it is scandalous, frivolous or vexatious:
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[6] The law on striking out is trite and has been encapsulated by the Supreme Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7, where it was distilled by Mohamed Dzaiddin SCJ (as he then was) in the following words:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons, Limited v Wilkinson, Heywood & Clark, Limited* [1899] 1 QB 86, p 91), and this summary procedure can only be adopted *when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'* (*Attorney-General of the Duchy of Lancaster v London and North Western Railway Company* [1892] 3 Ch 274 (CA)). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether

A the party has a cause of action or a defence (*Wenlock v Moloney and Others* [1965] 1 WLR 1238; [1965] 2 All ER 871 (CA)). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in pari materia with our O 33 r 2 Rules of the High Court) (*Hubbuck v Wilkinson*). *The*
B *court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable*. (Emphasis added.)

[7] I am guided also by the Federal Court in *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; [2016]
C 3 CLJ 1, where it was stated by Ramly Ali FCJ:

> The principles for striking out pleadings pursuant to O 18 r 19 of the ROC are well settled. It is only in a plain and obvious case that recourse should be had to the summary process under this rule; and this summary process can only be adopted
D when it can clearly be seen that a claim on the face of it is obviously unsustainable (see *Bandar Builder*, *Hubbuck & Sons, Limited v Wilkinson, Heywood & Clark, Limited* [1899] 1 QB 86; *Attorney-General of the Duchy of Lancaster v London and North Western Railway Company* [1892] 3 Ch 274).
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> The test for striking out application under O 18 r 19 of the ROC as adopted by the
E Supreme Court in Bandar Builder are, inter alia, as follows:
>
> (a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule;
>
> (b) this summary procedure can only be adopted when it can be clearly seen that a claim or answers is on the face of it 'obviously unsustainable';
F
> (c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence; and
>
> (d) if there is a point of law which requires serious discussion, an objection
G should be taken on the pleadings and the point set down for argument under O 33 r 3 of the ROC; and
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> (e) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that defenses raised are not arguable.

H

[8] The question that arises is what do these phrases in O 18 r 19(1) mean? 'Scandalous' generally refers to matters which improperly cast a derogatory light on someone, usually a party to an action with respect to moral character or uses repulsive language; 'frivolous or vexatious' generally refers to a
I groundless action, with no prospect of success, often raised to embarrass or annoy the other party to an action; and 'abuse of the process of the court' generally refers to situations where the court's process is used for an unlawful object and not for the actual purpose intended for justice: per Ramly Ali JCA (as he then was) in *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235.

[9] It is, therefore, the duty of the court to scrutinise, with a fine-tooth comb, the evidence and the merits of the case to determine whether the action was bound to fail. This principle was set out by the Privy Council in *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1, and the Supreme Court in *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16.

CONTENTIONS, EVALUATION AND FINDINGS

[10] At the outset it must be mentioned that since the third defendant had relied on O 18 r 19(1)(a) of the Rules of Court, no affidavit evidence was required. This was made clear in the Court of Appeal case of *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235. The third defendant's affidavit in support and affidavit in reply, therefore, were filed on a without prejudice basis.

[11] A perusal of the plaintiff's statement of claim indicated that there was no cause of action whatsoever against the third defendant, save for the relief praying for an order that the third defendant be prohibited from taking executory action against the plaintiff. In fact, the plaintiff had admitted that the third defendant was the debenture holder and master chargee of the property; and that the third defendant had never received the redemption sum from the plaintiff. Bearing in mind the absence of a cause of action, this application should be allowed, as explained by the Federal Court in *Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases* [1983] 2 MLJ 227, and *Mohamed Yusop bin Abdul Wahab v American Express (M) Sdn Bhd* [2002] 6 MLJ 507.

[12] What is crucial to note is that the third defendant was not a party to the SPA and, therefore, not privy to it. The plaintiff, therefore, had no right to prohibit the third defendant from taking any execution action against the plaintiff and/ or the property.

[13] In any event, to obtain a declaration of ownership of the property, the plaintiff would have to pay the redemption sum to the third defendant and subsequently claim that from the first and second defendants.

[14] Furthermore, in the absence of a cause of action, the third defendant's interest in the property is indefeasible by virtue of s 340(1) of the National Land Code ('the National Land Code'), which reads:

> Section 340 — *Registration to confer indefeasible title or interest, except in certain circumstances*

A (1) The title of interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

B **[15]** The effect of s 340(1) of the National Land Code was explained in a plethora of cases including *Holee Holdings (M) Sdn Bhd v Chai Him & Ors* [1997] 4 MLJ 601 and *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81, where it was stated in the latter case by Abdul Hamid Omar FJ:

C Now the law: the position is that upon registration of a charge the law confers indefeabisle title in the charge (s 340(1) of the National land Code) but shall be defeasible in cases provided under sub-s (2) of the s 340.

D **[16]** Since there was no cause of action reflected in the plaintiff's statement of claim, there could be no circumstances that would render the interest of the third defendant defeasible. As such, this application should be allowed.

[17] In this case, it was undisputed that the third defendant was the master
E chargee of the property, and it was also admitted by the plaintiff that the redemption sum was not paid to the third defendant. The plaintiff, therefore, had no right to a declaration of ownshership of the property, or to an order to prohibit the third defendant from taking any execution action against the plaintiff or the property.

F **[18]** My view is fortified by *Chang Yun Tai & Ors v Dataran Mantin Sdn Bhd & Ors* [2008] 5 MLJ 295 where in that case, the plaintiffs applied to court seeking a declaration that the sale and purchase agreements which they had individually entered into with the developer were void. The court granted the
G bank's application, in that case, to strike out the suit as there was no reasonable cause of action.

CONCLUSION

H **[19]** In the upshot, based on the aforesaid reasons, and after careful consideration of all the evidence before this court, and written and oral submissions of counsel for both parties, this application was allowed with costs.

Application allowed with costs.

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Reported by Izzat Fauzan